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March 21, 2006

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex-Parte Presentation in WC Docket No. 06-10

Dear Ms. Dortch:

John D. Seiver and undersigned counsel recently met with William Kehoe and Adam Kirschenbaum of the Wireline Competition Bureau on behalf of the Florida Cable & Telecommunications Association, the Cable Television Association of Georgia, the South Carolina Cable Association, the California Cable & Telecommunications Association, the Alabama Cable Telecommunications Association, and the Cable Telecommunications Association of Maryland, Delaware, and the District of Columbia ("Joint Cable Operators"). The purpose of this meeting was to demonstrate why the Commission should either consider adopting additional regulations clarifying or declare, in conjunction with classifying BPL service, that pole capacity is insufficient under Section 224(f)(2) and 1.1403(a) of the Commission's rules only when space for new attachments cannot be made through reasonable make-ready construction by way of pole change-outs and line rearrangements. This letter explains issues discussed concerning the need for such a ruling.

The Joint Cable Operators expanded on comments filed in this proceeding by noting that under Section 224(f), telephone utility pole owners do not enjoy the same right to deny access for insufficient capacity, as the language of 224(f) only grants this exception to "utilities providing electric service". The fact that telephone utilities may not deny access for reasons of perceived "insufficient capacity" suggests that Congress understood the potential for anticompetitive pole attachment practices between competing providers of communications services. BPL providers will soon have as great an incentive as telephone utilities to exploit the insufficient capacity loophole to deny pole access to competing cable operators.

Furthermore, the Joint Cable Operators expanded on arguments made in their initial comments concerning utility attempts to impose a "just compensation" rate on full poles and the

relevance of these efforts to the question of what constitutes insufficient capacity.[1] As the *Alabama Power v. FCC*[2] decision explained, for both poles with available capacity and those without, if a buyer of space is not "waiting in the wings," the FCC's cable formula (which provides much more than marginal costs) provides more than any constitutionally required "just compensation" for the existing attachments. However, where an electric utility can show that a specific "opportunity" has been "lost" on a specific full capacity pole (and the *Alabama Power* court did not define "full capacity") an electric utility is entitled to recover something more than its marginal costs (although not necessarily more than the cable formula). Given this situation, electric utilities have an incentive to deny access even where reasonable makeready could accommodate a new attachment, as an access denial would allow the utility to exploit the difference between the cost of the attacher "going around" the full capacity pole by burying lines underground at great expense and the cost of attaching to its poles at an exorbitant rate only slightly lower than undegrounding, a reward to the utility for the "value" to the excluded attacher rather than the real cost shortfall that would be the subject of the "loss to the owner" standard of just compensation law.[3] Without a clarification of the meaning of "insufficient capacity", pole owning BPL providers could be in a position to deny access to poles as a means of both raising costs to competitors and increasing revenues to themselves.

The Joint Cable Operators also addressed certain issues raised by the reply comments of Duke Energy Corporation in this docket. Specifically, Duke Energy's reply comments mischaracterize the Joint Cable Operators position as a demand for utilities to "expand capacity" in violation of the *Southern Company* ruling.[4] As explained in their initial comments, the Joint Cable Operators are asking only for a clarification of what "insufficient capacity" means under the act – a request not only within the *Southern Company* court's language but one which that court specifically authorized the Commission to undertake.[5]

Ignoring the limited scope of this request, Duke Energy asserts that grant of the Joint Cable Operators request would amount to a "subsidy to the cable industry" and turn utilities into "captive contractors" forced to provide "unlimited capacity."[6] This assessment is wrong and

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[1] Joint Cable Operator Comments at 7.

[2] *Alabama Power v. FCC*, 311 F.3d 1357 (11th Cir. 2002) ("*Alabama Power*").

[3] *Alabama Power*, 311 F.3d at 1369-70.

[4] *See* Duke Energy Reply Comments at 4-5.

[5] *Southern Company, et al. v. Federal Communications Commission,* 293 F.3d 1338, 1348 (11th Cir. 2002) ("*Southern Company*") ("[Section 224(f)] is silent on the scope and parameters of the term 'insufficient capacity,' and on the relationship between that term and the utilities' ability to reserve available space for future needs. The absence of statutory language outlining this relationship is a gap in the statutory scheme").

[6] Duke Energy Reply Comments at 4-5.

misleading. First, the Joint Cable Operators are not asking for unlimited capacity expansions but rather are asking the Commission to define the circumstances when capacity is "insufficient" for the purposes of 224(f). Congress' allowance for utilities to deny access for reasons of insufficient capacity must be given meaning beyond the utilities' position, occasionally expressed in negotiations with the Joint Cable Operators, that if they have to so much as rearrange a line to make room for a new attachment then the poles had "insufficient capacity" justifying a denial of access. The Joint Cable Operators are only asking the FCC to interpret this phrase (which the *Southern Company* court found to be undefined in the Act and ambiguous) to save the cable industry countless hours in litigation and contract negotiation expenses along with potential for delays in network build-outs and upgrades.

Second, as Duke Energy is aware, pole attachments represent found money to utilities and provide them with revenues well in excess of their costs and expenses in maintaining their pole plant. Far from a subsidy, the Joint Cable Operator's request would only ensure that utilities make plant available while also benefiting from rearrangements and changeouts that generate even more revenue. Duke Energy's opposition cannot therefore be based in any sound business concern other than a desire to abuse their monopoly control of distribution facilities to gain a strategic edge for their BPL service in competition with cable.

Duke Energy's "captive contractors" remark shows a certain disregard for the purpose of the Pole Attachment Act and FCC regulations to designed to ensure cable operator service deployments reach all citizens, and it mirrors sentiments the Joint Cable Operators have heard expressed in pole attachment agreement negotiations, with utilities fearful of changes in the law which might require them to provide mandatory pole attachment rights to both cable operators and ILECs. Congress understood that the purpose of the Pole Attachment Act was to require electric utilities to provide pole access to cable operators on terms they might not otherwise agree too, a step necessary to ensure that utilities' monopoly control of essential distribution facilities did not thwart new communications systems and services from reaching the population. The suggestion that this framework is an unfair one is precisely the kind of anticompetitive posture we have been arguing utilities will adopt in anticipation of their BPL deployments.

Duke Energy further argued that the Joint Cable Operators request, along with the requests for additional pole attachment regulation by Next G Networks and Virtual Hipster, are outside the scope of the BPL classification proceeding and should be addressed elsewhere,[7] a point echoed in reply comments of Current Communications and the UPLC.[8] This argument is without merit. As Duke Energy acknowledges, the Commission has previously agreed to consider imposing additional regulations on broadband cable modem and DSL providers *in the same proceedings* that it classified each as an information service.[9]

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[7] Duke Energy Reply Comments at 6.

[8] Current Communications Reply Comments at 4; UPLC Reply Comments at 5-6.

[9] Duke Energy Reply Comments at 7.

For all these reasons, the Joint Cable Operators reiterate their request that the Commission adopt regulations or clarify that the term "capacity" under Section 224(f)(2) and 1.1403(a) of the Commission's rules refers to all pole capacity available to a utility whether installed in the distribution chain, in inventory or available through reasonable make-ready to ensure that any denial of access is not discriminatory or anti-competitive.

Please let me know if you have any questions.

Sincerely,

/s/ Christopher A. Fedeli

Christopher A. Fedeli

cc: Jeremy Miller
William Kehoe
Adam Kirschenbaum